mulated since the vesting of the trust.[23] The obvious injustice of this rule in many cases, defeating as it so often does the intention of the creator of the trust, has caused the courts of Massachusetts to construe it as a rule of substance and not of form, under the well known maxim of equity. Thus where a corporation purchased with its earnings some of its own shares and later distributed these shares among the stockholders, this was held a cash dividend.[24] So where a corporation declared a dividend in stock of a stranger corporation.[25] Where part of the property of a corporation was taken by a municipality in a forced sale under the right of eminent domain, the cash dividend declared from the proceeds was held to be capital, as a mere conversion of the corporate assets from realty into personalty.[26] So where the affairs of a corporation were wound up and the proceeds distributed in cash.[27] Where a corporation issued a cash dividend to be used in the purchase of new stock, it was held to be a stock dividend.[28] But where a cash dividend was declared with option to purchase stock in a stranger corporation, it was held to be a cash dividend.[29] And the mere fact that a vote of increase of the capital stock and a vote of a cash dividend took effect on the same day, and that the amount of the cash dividend was just enough to enable each stockholder to pay for the amount of additional stock to which he was entitled to subscribe, did not make this a stock dividend, since the stockholder might subscribe or not as he pleased.[30]

LIABILITY OF PROMOTERS OF CORPORATIONS TO SHAREHOLDERS.—It is settled that promoters of corporations stand in a fiduciary relation to the corporation and that they cannot make secret profits while acting for the corporation.[1] As this relation is in most cases sustained towards the corporation only and not towards the subscribers for shares, any fraud of the promoter is usually an injury to the corporation, and the corporation is the proper party to seek redress.[2] There is, however, an exception to this rule that the cor-

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[23] Leland *v.* Hayden, 102 Mass. 542.

[24] Leland *v.* Hayden, *supra.*

[25] Gray *v.* Hemenway (Mass.), 98 N. E. 789; Union Trust Co. *v.* Taintor, 85 Conn. 452, 83 Atl. 697.

[26] Heard *v.* Eldredge, 109 Mass. 258.

[27] Gifford *v.* Thomson, 115 Mass. 478.

[28] Rand *v.* Hubbell, 115 Mass. 461.

[29] Gray *v.* Hemenway, 206 Mass. 126, 92 N. E. 31.

[30] Lyman *v.* Pratt, 183 Mass. 58, 66 N. E. 423.

[1] Fred Macey Co. *v.* Macey, 143 Mich. 138, 106 N. W. 722; Jordan & Davis *v.* Annex Corp., 109 Va. 625, 64 S. E. 1050; Erlanger *v.* New Sombrero Phosphate Co., L. R., 3 App. Cas. 1218; Dickerman *v.* Northern Trust Co., 176 U. S. 181 (*dictum*).

[2] Niles *v.* Ry. Co., 176 N. Y. 119, 68 N. E. 142; Meyer *v.* Bristol Hotel Co., 163 Mo. 59, 63 S. W. 96; Puritan Coal Mining Co. *v.* Pennsylvania Ry. Co., 237 Pa. 420, 85 Atl. 426; COOK ON CORPORATIONS, 7 ed., § 751.

poration alone can sue for injuries to it; namely, where the corporation, by reason of the fraud or negligence of its directors, is unable or unwilling to sue, any single stockholder, under certain conditions, may sue on behalf of the corporation.[3]

Under some circumstances promoters may stand in a fiduciary relation to the shareholders individually.[4] Thus, where a promoter invites others to join with him to acquire property for purposes of sale, and later the associates form a corporation to take over the property, the promoter is accountable to his fellows individually—the formation of the corporation being incidental to the enterprise.[5]

Often there is no fixed line of demarcation between the fraud of the promoter as an injury to the corporation and as an injury to the shareholders as individuals. In the recent case of *Sims* v. *Edenborn* (C. C. A.), 206 Fed. 275, a promoter organized a syndicate to subscribe to the stock of a corporation to be organized to take over certain properties, including that of a particular company, concealing the fact from the other members of the syndicate that he was largely interested in the selling company, and that he intended to pay his subscription out of his interest in that company. It was held that the fraud was an injury to the newly-organized corporation, and that the individual members of the syndicate, who became shareholders in that corporation, could not rescind their contracts with the promoter. Previously the same question, arising from the same transaction, had been decided in New York with a contrary result.[6] In the latter case a syndicate member, upon tendering the promoter the shares allotted to him in the new corporation, was allowed to rescind the contract although the promoter could not be put in *statu quo* because of the complicated nature of the transaction.

The New York decision that the fraud was an injury to the shareholder individually seems preferable to the view taken by the Federal court. The situation differs from that where there is no contract directly between the promoter and the shareholders. In the principal case the syndicate members agreed, *inter sese,* to purchase jointly certain property; it is immaterial whether this consisted of land or of shares in a corporation. If a promoter conceals the fact that he is selling his own property to a corporation, which he organizes, the corporation may rescind the sale.[7] In the principal case the promoter sold his own property to the syndicate not to the newly-formed corporation. Hence the injury was to the members of the syndicate who contracted directly with the promoter.

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[3] Foss *v.* Harbottle, 2 Hare 461; Hawes *v.* Oakland, 104 U. S. 450. A minority cannot sue when the act causing injury is within the power of the majority to ratify.

[4] Franey *v.* Warner, 96 Wis. 222, 71 N. W. 81.

[5] Brewster *v.* Hatch, 122 N. Y. 349; Teachout *v.* Van Hoesen, 76 Iowa 113, 40 N. W. 96.

[6] Heckscher *v.* Edenborn, 203 N. Y. 210, 96 N. E. 441.

[7] Erlanger *v.* New Sombrero Phosphate Co., *supra;* COOK ON CORPORATIONS, 7 ed., § 651.

It is often stated that, in cases of fraud, it is a condition of rescission that the *status quo* be restored.[8] This doctrine involves a return by the plaintiff, seeking rescission, of that which he has received under the contract;[9] and, as far as possible, a restoration of the defendant to his original position.[10] Since he who seeks equity must do equity, the courts, with rare exceptions,[11] refuse to grant rescission and allow the plaintiff to retain any benefits arising from the transaction.[12] But the restoration of a fraudulent defendant to his original position is but an incident of rescission.[13] So where by reason of the acts of the defendant it is impossible to restore the *status quo,* as to him, rescission is granted, provided the plaintiff returns that which he has received by virtue of the contract.[14]

In the principal case the syndicate member returned to the promoter the shares received by the former in the corporation formed as a result of the enterprise. This was all he had received. Since the syndicate had acquired property other than that sold to it by the promoter, it was impossible to place the latter in his original position. The New York decision allowing rescission seems to be sound, although the promoter might have to assume the sole ownership of the entire properties purchased by the syndicate.[15]

RIGHTS UNDER ULTRA VIRES CONTRACTS.—The doctrine of *ultra vires* is much confused and unsettled. This confusion is due in some measure to the carelessness with which the courts have used this term. It is a rather common error to confuse the terms *illegality* and *ultra vires*. The term *illegality* is properly applicable to contracts only when the contract is illegal in itself, because it is either *malum in se* or *malum prohibitum*;[1] *ultra vires,* on the contrary, while not accurately describing contracts which are illegal in this sense, because they are governed by the same principles that govern similar contracts between individuals,[2] is properly applicable to con-

[8] Grymes *v.* Sanders, 93 U. S. 51; Handforth *v.* Jackson, 150 Mass. 149, 22 N. E. 634; Sheffield Nickel Co. *v.* Unwin, 2 Q. B. D. 214.

[9] Russell *v.* Russell, 63 N. J. Eq. 282, 49 Atl. 1081.

[10] Gassett *v.* Clazier, 165 Mass. 473, 43 N. E. 193; Galvin *v.* O'Brien, 96 Mich. 483, 56 N. W. 85; Robinson *v.* Siple, 129 Mo. 208, 31 S. W. 788.

[11] See Evans *v.* Brooks (Okl.), 124 Pac. 599.

[12] Mortimer *v.* McMullen, 202 Ill. 413, 67 N. E. 20; Hinchman *v.* Matheson Motor Car Co., 151 Mich. 214, 115 N. W. 48.

[13] Hammond *v.* Pennock, 61 N. Y. 145, Guckenheimer *v.* Angerine, 81 N. Y. 394.

[14] Masson *v.* Bovet, 1 Denio (N. Y.), 69, 43 Am. Dec. 651; Brown *v.* Norman, 65 Miss. 369, 4 So. 293; Felt *v.* Bell, 205 Ill. 213, 68 N. E. 794; Oshea *v.* Vaughn, 201 Mass. 412, 87 N. E. 616; Liland *v.* Tweto, 19 N. D. 551, 125 N. W. 1032.

[15] Heckscher *v.* Edenborn, *supra.*

[1] ELLIOTT, PRIV. CORP., 4 ed., § 222.

[2] People *v.* Chicago Gas Trust Co., 130 Ill. 268, 17 Am. St. Rep. 319; Franklin Co. *v.* Lewiston Inst. for Sav., 68 Me. 43, 28 Am. Rep. 9.